

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY E. YOUNG and TENNESSE VALLEY AUTHORITY,
FOSSIL PLANT, New Johnsonville, TN

*Docket No. 00-476; Submitted on the Record;
Issued February 23, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant filed a timely claim for compensation; and (2) whether appellant has met his burden of proof to establish that he was an employee of the United States within the meaning of the Federal Employees' Compensation Act.

On January 7, 1998 appellant, then a 52-year-old former boilermaker, filed an occupational disease claim alleging that on February 20, 1986 he first became aware of his hearing loss and related it to factors of his federal employment. The employing establishment terminated appellant on December 13, 1991 and he subsequently worked as a boilermaker for various private contractors.

By decision dated December 11, 1998, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that it was untimely filed.

By letter dated January 5, 1999, appellant requested an oral hearing before an Office hearing representative.

An oral hearing was held on July 27, 1999. Appellant testified that he worked for the employing establishment until 1991, at which time he began working for private contractors on the employing establishment premises. He further testified that his paychecks included both the contractor's name and the employing establishment's name and that the employing establishment "called the shots." Appellant described his noise exposure and stated that he learned that he could file a compensation claim in 1997.

Appellant submitted a report dated July 26, 1999 from Michelle Hames, a certified audiologist.

By decision dated August 30, 1999, the Office hearing representative affirmed the Office's December 11, 1998 decision. The hearing representative noted that appellant became aware of his alleged hearing loss and related it to his federal employment in the 1980s but did not

file his occupational disease claim until 1998, more than seven years after the employing establishment terminated him. He found that the record contained no evidence indicating that appellant's supervisor had actual knowledge of his alleged injury or that appellant was incompetent and/or unable to file his claim timely.

The Board finds that the evidence of record is insufficient to establish that appellant's January 7, 1998 claim was timely filed.

Section 8122(a) of the Act¹ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death. Compensation for disability or death, including medical care in disability cases, may not be allowed if a claim is not filed within that time unless:

“(1) the immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death; or

“(2) written notice of injury or death as specified in section 8119 was given within 30 days.”

Section 8119² provides that a notice of injury or death shall be given within 30 days after the injury or death; be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed; be in writing; state the name and address of the employee; state the year, month, day and hour when and the particular locality where the injury or death occurred; state the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause; and be signed by and contain the address of the individual giving the notice.

In a case of occupational disease, the Board has held that the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment.³

When an employee becomes aware, or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitations period even though he does not know the precise nature of the impairment or whether the ultimate result of such adverse affect would be temporary or permanent.⁴ Where the employee continues in the same employment after such

¹ 5 U.S.C. § 8122(a).

² *Id.* at § 8119.

³ *Leo Ferraro*, 47 ECAB 350, 356 (1996); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

⁴ *See Leo Ferraro*, *supra* note 3 at 357; *Edward Lewis Maslowski*, 42 ECAB 839, 846 (1991).

awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.⁵

On his January 7, 1998 claim form, appellant indicated that he first related his alleged hearing loss to his employment on February 20, 1986. Appellant's statement of awareness was competent to start running the limitations period under section 8122(a).⁶ Appellant by his own admission indicated that he was aware of a possible causal relationship between his symptoms and factors of his federal employment approximately 12 years before he filed his January 7, 1998 claim. This interval is clearly outside of the three-year time limitation under section 8122 of the Act.

However, appellant's continued federal employment until December 13, 1991 and continued noise exposure tolled the start of the time limitation period. As appellant continued to work at the employing establishment until December 13, 1991, the three-year time limitation did not begin to run until that date. Nevertheless, appellant's January 7, 1998 claim was not filed within three years of December 13, 1991.

Appellant's claim would still be timely under section 8122 if his immediate superior had actual knowledge of his alleged hearing loss within 30 days of the date on which he related it to his employment. However, there is no evidence indicating that appellant's supervisor had actual knowledge, sufficient to put him reasonably on notice of appellant's contention that his alleged hearing loss was work related, within 30 days of December 13, 1991.

The Board further finds that appellant has not met his burden of proof in establishing that he was an employee of the United States as defined by the Act after December 13, 1991.

A prerequisite to entitlement to benefits under the Act is that the claimant or individual in whose name benefits are claimed be an employee of the United States as defined by 5 U.S.C. § 8101(1).⁷ In relevant part, 5 U.S.C. § 8101(1) defines "employee" as follows:

"(A) [A] civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

"(B) [A]n individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorized the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual...."

The Board has held that there are cases in which it is necessary to go beyond the statutory definition of "employee" to determine whether a particular worker comes within the Act's coverage by examining the particular facts and circumstances of the worker's employment and

⁵ See *William D. Goldsberry*, *supra* note 3.

⁶ See *Leo Ferraro*, *supra* note 3 at 357.

⁷ *Kasane Sawyer*, 40 ECAB 1332, 1335 (1989).

applying the relevant principles of an employer-employee relationship.⁸ Where the question is whether a particular worker was an employee of the United States or an independent contractor, the Board has held that factors to be considered in resolving this issue include nature of the work performed, the right to hire and fire, right of control of the work activities, the method of payment for the work, the length of time of the job and the intention of the parties.⁹

Larson's Workers' Compensation Law states: "There can be no compensation liability in the absence of a contract of hire between the employee and the borrowing employer."¹⁰ In this case, there is no evidence that there was a contract of hire between appellant and the employing establishment during the relevant time period.

Although appellant's exposure to boiler noise apparently continued after December 13, 1991, the date the employing establishment terminated him, he may not be compensated for his alleged hearing loss subsequent to the three-year limitation because he was no longer an "employee" of the United States. During his July 17, 1999 oral hearing, appellant testified that after his employment with the employing establishment ended in 1991 he continued to work as a boilermaker for a private contractor. He stated that the contractor employed him but he worked on the employing establishment premises and the employing establishment "called the shots." By his own admission, however, appellant's employment with the employing establishment ended December 13, 1991 and he became an employee of a contractor. In the absence of evidence that there was a contract between appellant and the employing establishment and in light of the presumption that appellant continued to be the employee of the contractor,¹¹ the Board finds that appellant has not met his burden of establishing that he was an employee of the United States after December 13, 1991.

⁸ *Id.* at 1336.

⁹ *Id.*

¹⁰ *Larson, Workers' Compensation Law* § 48.11 (1993).

¹¹ *Id.*

The decisions of the Office of Workers' Compensation Programs dated August 30, 1999 and December 11, 1998 are hereby affirmed.

Dated, Washington, DC
February 23, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member